No. 82-1179

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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SUBJECT INDEX

TABLE OF CITATIONS

Cases

Statutes

Other

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A. Respondents Acknowledge the Conflict With *Lau* and the Pendency of the Same Issue in *Guardians.*

It is undisputed that this case presents the question of whether an "effect" standard may be applied to foreclose policies which discriminate on the basis of race or sex in federally-assisted programs under Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.*, or its predecessor legislation, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.* Respondents, in their joint brief opposing the petition, flatly admit that the court of appeals has decided this federal question in a way in conflict with the

decision of this Court in *Lau* v. *Nichols*, 414 U. S. 563 (1974), and that the same issue is now pending before this Court in *Guardians Association of Police* v. *Civil Service Commission of the City of New York*, No. 81-431. (Jt. Br. pp. 6-7. *Cf.* Pet. Cert. p. 8).

B. Summary of Reply Argument

Respondents acknowledgment of the conflict with *Lau* and the pendency of the same issue before this Court in *Guardians*, in and of itself would justify issuance of the writ to address the first question presented in the petition. (Pet. Cert. Question 1). Respondents, nevertheless, request that the petition be denied because they dispute the additional reasons set out in the petition for granting the writ. To do so they rewrite the decisions below to deny the conflict with *Foman* v. *Davis*, 371 U. S. 178 (1962), and to avoid the jurisdictional question presented under Rule 60(b), Fed. R. Civ. P. (Pet. Cert. Questions 2 and 3). They also grossly distort the applicable rule of pleading and the record to assert that amendment would be futile. Respondents' transparent revisions of the decisions below and the record bare the flaws in their opposition to the petition. The revisions also reflect an inability to face the questions presented and a consistent reluctance to obtain a decision on merits in this protracted litigation.

1. Respondents rewrite the decision below to deny the conflict with *Foman*.

Respondents deny the conflict of the decision below with the decision of this Court in *Foman* v. *Davis*, 371 U. S. 178 (1962), that the spirit of the Federal Rules requires a justifying reason which is "apparent or declared" for the denial of an opportunity to amend a complaint. (Jr. Br. pp. 7-11). To do so they must rewrite the decision below. This is evident from the following:

Respondents' Brief	Court of Appeals Orders
"These decisions state abundant reasons for the denial of leave to amend her complaints. . . ." (Jt. Br. p. 6). "Specifically, the Court of Appeals noted that petitioner's attempt to amend *was* 'belated.'" (*Id.* at 8. emphasis added). "Petitioner *had* elected to stand on her complaints and *had* failed to move to amend until after her appeal was denied." (*Ibid.* emphasis added).	"[T]his case presents a number of reasons that *may* be relied upon for a denial of a motion to amend—reasons that need not be stated." (Pet. Cert. App. p. 2d. emphasis added). "These were merely *examples* * * * that the district court *could* rely on in this case. . . ." (*Id.* at 2e. emphasis added).

The clear thrust of this Court's holding in *Foman* is that the *actual* justifying reason for the denial of amendment must be "apparent or declared." Any case, including both this case and *Foman* itself, *may* present a number of *possible* reasons that *could* be relied on to deny amendment after an appeal. If examples of theoretical or possible reasons are sufficient, *Foman* is no longer viable. Neither the district court nor the court of appeals stated any actual reason for denying petitioner an opportunity to amend in either court.

On May 13, 1982 the court of appeals held that "the district court did not have jurisdiction to rule on the merits of the renewed motions to amend" because Judge Pell's procedural order of May 27, 1981 had denied petitioner's motion to amend. (Pet. Cert. App. p. 2f). In terms of *Foman*, however, that statement is completely inadequate because Judge Pell's order had stated no reason for the denial. (*Id.* at 2b). Neither did the order denying rehearing in banc on June 22, 1981. (*See Id.* at 2g).

Respondents transparent attempt to convert examples of possible reasons on which the district court could rely (notwithstanding its lack of jurisdiction to rule on the merits at all) into declarations by either of the courts below that such reasons

actually applied to this case confirms the conflict with *Foman* set out in the petition. (Pet. Cert. pp. 8-10).

2. Respondents substitute their argument for the ruling of the district court to avoid the jurisdictional question under Rule 60(b).

Respondents claim that the jurisdictional question presented under Rule 60(b), Fed. R. Civ. P., is governed by "well-established" principles of federal procedure. (Pet. Cert. Question 3; Jt. Br. pp. 11-12). They do so, however, on the basis of having first substituted their argument in the district court for the ruling of that court. (Jt. Br. pp. 3, 7-8 n. 7). This is evident from the following:

Respondents' Argument	District Court Ruling
"[T]he 'arbitrary and invidious' language cited by petitioner referred only to petitioner's § 1983 claim." (Jt. Br. pp. 7-8 n. 7).	"There are no allegations, purposeful discriminations other than legal conclusions that the acts of defendants were 'arbitrary and invidious.' These allegations are not accepted by the Court as true . . . ." (R. Tr. 5/23/80 p. 20).

After the substitution of their argument for the ruling of the district court is eliminated, the quotation from 3 Moore's Federal Practice § 15.11, on which respondents attempt to rely, clearly supports the position of petitioner, not respondents. (Jt. Br. p. 12).

Professor Moore expressly limits his statement that a pleader "will not normally be able to amend either in the appellate court, or in the trial court" to circumstances "[w]here, *although given an opportunity to amend,* the pleader has stood upon his pleading and appealed." Here, the amendments sought by petitioner to cure the defects specified by the court of appeals on May 6, 1981, would not have cured, or even addressed, the "legal conclusion" ruling of the district court on

May 23, 1980. Plaintiff had no prior opportunity or occasion to cure the defects specified by the appellate court on May 6, 1981. She moved to amend promptly thereafter.

The amendments required to cure the defects specified by the appellate court would have been futile with respect to the "legal conclusion" defect relied upon by the district court, notwithstanding "the liberal pleading requirements of Fed. R. Civ. P. § 9(b)" with respect to intent. (*See* Pet. Cert. App. p. 12a). In fact, the "legal conclusion" ruling implicitly rejected both of the defects on which the appellate court subsequently relied to affirm the dismissal. (Pet. Cert. pp. 5-6).

3. Respondents' assertion that amendment would be futile, grossly distorts the applicable rule of pleading and the record.

Finally, petitioner must reply briefly to the assertions that the proposed amendments would be "futile" because she "never intended to meet the standard of purposeful discrimination as defined by this Court." (Jt. Br. pp. 6, 9-11).

First, respondents' argument that amendment would be "futile" suggests that, in the context of amendment to cure defects for which a complaint has been dismissed, futility refers to something other than the failure of a proposed amendment to cure the defect for which the complaint has been dismissed.[1]

[1] Respondents' notation that petitioner's complaint against five other Illinois medical schools was dismissed is inaccurate. (Jt. Br. p. 3 n. 2). On the contrary, the district court allowed amendments substantially identical to those sought here in order to cure the defects specified by the court of appeals in this case on May 6, 1981. The present appeal in that case involves summary judgments on the grounds of mootness and laches. At issue is whether these schools must remedy the effect of their former age policies on petitioner in addition to providing assurance that the claimed violation will not recur, and whether petitioner's delay in filing that action until after this Court reversed the first dismissal in this case constitutes laches. Consolidation of the appeals was denied on October 6, 1982. (Pet. Cert., App. p. 1g.).

It is difficult to imagine a more inaccurate and pernicious rule of pleading than respondents' suggestion that petitioner should be denied an opportunity to amend because of their contention that she will not be successful in proving the fact of "purposeful and intentional" discrimination against women which she seeks leave to allege. Such an argument is no more than a denial of the facts alleged in the proposed amendment. Such a denial does no more than present an issue of fact for trial.

Second, respondents' assertion that "petitioner has never intended to meet the standard of purposeful discrimination as defined by this Court" distorts the record. On the contrary, the proposed amendments were squarely based upon this Court's statement in *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256 (1979). In particular, petitioner intended to prove that each respondent school "selected or reaffirmed" its former age policy "at least in part 'because of' not 'mostly in spite of' its adverse effect upon" women. *Id.* at 279.

CONCLUSION

The importance and substantiality of the questions presented have not been denied. The premature rejection of *Lau* is admitted. In light of the inability to face the additional issues presented in the petition without grossly distorting the decisions below and the record, the need for plenary review is indisputable. Indeed, petitioner suggests that summary reversal is now in order, even before *Guardians* is decided and even if *Lau* is not reaffirmed therein.

For these reasons and the reasons set out in the petition, a writ of certiorari should issue to review the decisions of the United States Court of Appeals for the Seventh Circuit affirming the renewed dismissal of the complaints and denying petitioner an opportunity to correct the defects by amendment.

Respectfully submitted,

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